

² The case record provided the Board includes evidence received after OWCP issued its October 3, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 61-year-old former mail handler, injured her lower back while lifting mail sacks and boxes on September 21, 2002. OWCP initially accepted her claim for lumbar strain, but subsequently expanded the claim to include lumbar intervertebral disc displacement and psychogenic pain.³ Appellant last worked for the employing establishment in September 2003.⁴ She returned to work in a limited-duty capacity on September 23, 2003, but stopped work the following day. In February 2013, appellant filed a claim for recurrence of disability (Form CA-2a) beginning September 25, 2003.⁵

In a May 16, 2013 decision, OWCP denied appellant's claimed recurrence of disability beginning September 25, 2003. The decision noted that her claim had been accepted for lumbar sprain and lumbar intervertebral disc displacement. Psychogenic pain was omitted. OWCP denied the claim on the basis that the evidence of record failed to demonstrate that the claimed recurrence of disability was causally related to the September 21, 2002 work injury.

Following the May 16, 2013 decision, OWCP received various medical records, which included outpatient progress notes from A&P Pain and Wellness Center, where appellant received therapy for both her psychological and lumbar-related orthopedic conditions.⁶ The A&P progress notes covered the period May 2013 through September 2014. Dr. Orlando P. Peccora, a Board-certified psychiatrist, oversaw appellant's treatment at A&P. He provided various treatment notes and reports, including narrative reports dated March 7 and 27, 2014. Dr. Peccora indicated that appellant remained temporarily totally disabled as a direct result of her accepted September 21, 2002 physical condition and secondary emotional condition. His multi-axial diagnoses included: psychogenic pain disorder; major depressive disorder; depression/anxiety; lumbar disc displacement; and lower back strain.

OWCP also received an undated report from Dr. John B. Schoonmaker, a Board-certified psychiatrist, who had treated appellant since August 2004. Dr. Schoonmaker reported that appellant suffered a physical injury to her back on September 21, 2002, and suffered an aggravation of that same injury after returning to work for two days. He also reported that she suffered an emotional injury secondary to her covered back injury. Dr. Schoonmaker had last seen appellant on February 10, 2006. His diagnoses included: pain disorder associated with psychological factors and a general medical condition, major depression, and chronic pain disorder associated with appellant's injury. Dr. Schoonmaker explained that all of the diagnoses were directly related to the September 21, 2002 on-the-job injury, and they continued to render appellant temporarily totally disabled.

³ Appellant's pain disorder was initially adjudicated as a separate occupational disease claim (file number xxxxxx925) before being accepted under claim file number xxxxxx073. OWCP combined the two claims, and designated the September 21, 2002 traumatic injury claim (file number xxxxxx073) as the master file.

⁴ OWCP paid appellant wage-loss compensation for temporary total disability through September 6, 2003.

⁵ Appellant's casual appointment as a mail handler expired on December 31, 2003.

⁶ The A&P treatment records included individual therapy notes, stress management group notes, physical conditioning notes, massage therapy notes, and pain process group notes.

Appellant was also under the care of Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon. The newly submitted evidence included Dr. Shade's reports dated March 26, May 9, August 9, September 27, and November 8, 2013. Dr. Shade first examined appellant on September 9, 2011. In his latest report, he indicated that she continued to require both mental and physical medical care in order to increase her mobility, flexibility, self-esteem, confidence, and reduce the anxiety, depression, and stress due to her September 21, 2002 work-related injury, which had left her temporarily totally disabled.

OWCP also received a February 3, 2014 lumbar magnetic resonance imaging (MRI) scan that revealed disc bulges at L2-3, L3-4, and L5-S1, as well as a disc herniation at L4-5.

Dr. Jeffery D. Reuben, an orthopedic surgeon, examined appellant on February 14, 2014, and reviewed her recent lumbar MRI scan. He reported that she injured her back at work on September 21, 2002 while lifting a heavy sack. Dr. Reuben diagnosed discogenic lumbar pain, L4-5 disc herniation, and right lumbar radiculitis, which he attributed to appellant's September 21, 2002 work-related injury. He recommended a series of lumbar epidural steroid injections, which she agreed to undergo. Dr. Reuben also submitted a February 18, 2014 attending physician's report (Form CA-20), which noted that appellant was temporarily totally disabled.

Dr. James F. Hood, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on May 28, 2014. He characterized her September 21, 2002 employment injury as a "simple soft tissue lumbar sprain without radiculopathy," which would have resolved within a three-month period. Dr. Hood further reported that there were no current objective findings that the "accepted work injuries" were active and disabling. With respect to the effects of the September 21, 2002 lumbar sprain, he advised that appellant could return to full-duty work.

On July 7, 2014 appellant's then-representative filed a motion to exclude Dr. Hood's June 4, 2014 report. The motion also noted that there was an outstanding request for reconsideration from May 28, 2013. OWCP replied on July 24, 2014, advising that the record did not include a formal request for reconsideration dated May 28, 2013. It instructed appellant's then-representative to submit the appeal request form that accompanied the particular decision(s) for which reconsideration was being sought.

Under cover letter dated August 13, 2014, appellant's then-representative indicated that the request for reconsideration was mailed on May 28, 2013, and had not since been returned. The letter included a copy of the appeal request form from the May 16, 2013 decision. Appellant's reconsideration request was dated May 28, 2013.

Appellant continued to submit additional medical evidence, including a June 30, 2014 follow-up report from Dr. Reuben, a July 10, 2014 initial evaluation report from Dr. Rubin S. Bashir, and a July 24, 2014 lumbar MRI scan. Dr. Bashir, a Board-certified orthopedic surgeon, noted a September 21, 2002 history of injury and diagnosed psychogenic pain, lumbar sprain, lumbar disc displacement, radiculitis, chronic low back pain, and bilateral leg pain. He advised that appellant was temporarily totally disabled.

OWCP referred appellant to Dr. Frank L. Barnes, a Board-certified orthopedic surgeon. Dr. Barnes examined appellant on August 14, 2014 and diagnosed chronic lumbar pain. He noted there were numerous indications of symptom magnification. Dr. Barnes explained that based on the current physical examination and a review of the medical records, there was no evidence that appellant was unable to do her usual job. He believed appellant had recovered from her injuries.

OWCP also received a September 6, 2014 report from Dr. Julia Franklin, a chiropractor, who provided a low back evaluation. Dr. Franklin reported that appellant demonstrated moderately decreased motor strength and sensation of the lower extremities. Appellant also had palpable muscle spasms in the lumbosacral spinal regions. She was only able to walk 15 minutes at a time on level surfaces without the use of her cane, and she could not stair climb at all. Additionally, Dr. Franklin reported that appellant's outcome assessments demonstrated significant depression, an inability to relax, and severe difficulty with activities of daily living inside and outside of the house. Lastly, she noted that appellant was limited in her social activities due to her physical and emotional health.

In a decision dated October 3, 2014, OWCP found that appellant's request for reconsideration was untimely. It also found that she had not presented clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁹ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part

⁷ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607.

⁹ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹⁰

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered “physician[s]” as defined under FECA.¹¹ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹² A clinical psychologist may serve as a treating physician for a work-related emotional condition.¹³ Additionally, chiropractors are considered physicians only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray.¹⁴

ANALYSIS

OWCP’s latest merit decision is dated May 16, 2013. That decision found that the evidence of record failed to demonstrate appellant’s claimed disability beginning September 25, 2003 was causally related to the September 21, 2002 work injury. As previously noted, OWCP’s May 16, 2013 decision did not identify psychogenic pain as an accepted condition.

On July 7, 2014 OWCP received a motion to exclude certain medical evidence from the record. However, at the end of the motion appellant’s representative also noted that he had previously filed a request for reconsideration (May 28, 2013), and had yet to receive a reply from OWCP. On July 24, 2014 OWCP advised him that no record of a May 28, 2013 request for reconsideration had been received. It inquired as to which decision(s) appellant sought reconsideration, and further requested that corresponding appeal request form(s) be submitted.¹⁵ Appellant’s representative replied on August 13, 2014. He stated that the request for reconsideration was mailed on May 28, 2013 to a London, KY P.O. Box, and had not been returned as undeliverable. Appellant’s representative enclosed a copy of the appeal request form

¹⁰ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit, and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹² *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

¹³ *See* 20 C.F.R. § 10.312; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(2) (January 2013).

¹⁴ 5 U.S.C. § 8101(2); *see Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹⁵ OWCP noted that the last two decisions were dated May 19, 2010 and May 16, 2013. The former expanded the claim to include psychogenic pain, and the latter decision denied appellant’s recurrence claim.

associated with OWCP's May 16, 2013 decision. The form was signed by appellant and dated May 28, 2013. OWCP received the completed appeal request form on September 2, 2014.

The record indicates that on July 7, 2014 OWCP first received notice of appellant's reconsideration request. However, by this time, more than a year after OWCP issued its May 16, 2013 merit decision and the request was untimely.¹⁶ Because appellant's request was untimely, she must demonstrate clear evidence of error by OWCP in its denial of her claimed recurrence of disability beginning September 25, 2003.¹⁷

The October 3, 2014 decision noted that appellant submitted "[m]edical reports dated [May 6, 2013 through September 9, 2014]." The senior claims examiner did not otherwise identify or describe the various medical records received since OWCP's May 16, 2013 decision. She then concluded without explanation that the medical reports did not establish clear evidence of error on the part of OWCP.¹⁸

An OWCP decision "shall contain findings of fact and a statement of reasons."¹⁹ The October 3, 2014 decision does not identify OWCP's reason(s) for finding appellant had not demonstrated clear evidence of error based on the newly submitted medical evidence. OWCP's decision should include "a brief evaluation of the evidence submitted...."²⁰ The senior claims examiner merely identified medical reports that fell within a particular timeframe. OWCP must review all the evidence to determine if the clear evidence of error standard has been met.²¹ Because OWCP's October 3, 2014 decision does not comply with 20 C.F.R. § 10.126, the decision will be set aside in part. Accordingly, the case shall be remanded for a proper review of the evidence identified above and issuance of an appropriate final decision.

CONCLUSION

OWCP properly determined that appellant's request for reconsideration was untimely pursuant to 20 C.F.R. § 10.607(a). As to whether appellant presented clear evidence of error, that aspect of the case is not in posture for decision.

¹⁶ See *supra* note 9. Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b.

¹⁷ 20 C.F.R. § 10.607(b).

¹⁸ The remainder of the October 3, 2014 decision addressed various correspondence submitted by appellant's then-representative, including the previous request to exclude Dr. Hood's June 4, 2014 report.

¹⁹ 20 C.F.R. § 10.126.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5b.

²¹ See *A.M.*, Docket No. 14-1351 (issued October 20, 2014).

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2014 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: August 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board